Filed 7/24/20 Brown v. Vrieze CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALICE BROWN, Plaintiff and Appellant, v. JOHN VRIEZE ET AL., Defendants and Respondents.	A157713 (Humboldt County Super. Ct. No. DR180848)

Alice Brown appeals from a judgment of dismissal entered after the trial court granted respondents' special motion to strike her complaint pursuant to the "anti-SLAPP" statute, Code of Civil Procedure section 425.16 (section 425.16). She contends the motion should not have been granted because her causes of action are not subject to the statute. We will affirm.

I. FACTS AND PROCEDURAL HISTORY

Brown sued respondents John Vrieze and the law firm of Mitchell, Brisso, Delaney & Vrieze, LLP (Law Firm) in December 2018. In her form complaint, she purported to assert claims for "intentional misrepresentation/fraud," "fraud upon the court," "defamation/slander," "misrepresentation of the facts made with malice that caused a bent of mind in presiding judge in the United States District Court which led to the judge depriving plaintiff of her right of redress," and "conspiracy to deprive plaintiff of her right of redress under the First Amendment to the United States

Constitution and Article 1, section 3(a) to the California Constitution." Appended to the form complaint were attachments for a fraud cause of action and a "deprivation of right of redress" cause of action.

The entirety of Brown's complaint was based on an allegation that Vrieze, while representing an opposing party in prior litigation, falsely told a federal magistrate that Brown had refused to have her deposition taken. Specifically, she alleged that on December 5, 2017, Vrieze "knowingly, willingly, and with malice made a misrepresentation to the Magistrate Judge Robert Illman[,] . . . claiming that plaintiff Alice Brown refused to do a deposition which caused the court to form a bent of mind against plaintiff that ultimately led the court to dispose of her lawsuit against the defendants' clients." She alleged that Vrieze's representation was false because she "did not refuse to be deposed," but to the contrary sent a letter to defendants "agreeing to be deposed at the proper time, after the initial case management conference and not before." She also asserted that Vrieze concealed the fact that he was in possession of her letter and, because of the court's reliance on Vrieze's statement, she lost credibility with the court and "[t]he Court never trusted the evidence provided by the plaintiff as defendant John Vrieze painted a picture of plaintiff being a lying ignorant [expletive]." Further, she asserted, Vrieze informed the court that Brown "was born in Compton California, was a high school dropout and was incompetent in her pleadings."

A. Respondents' Anti-SLAPP Motion

In February 2019, respondents filed a special motion to strike Brown's complaint under section 425.16, contending the causes of action arose from respondents' exercise of free speech or petition rights and there was no probability Brown would prevail on the merits. In support of their motion,

respondents submitted a declaration from Vrieze, which described the underlying federal litigation as follows.

In December 2016, Brown filed a civil action in the United States District Court for the Northern District of California against the County of Del Norte, former Sheriff Dean Wilson, Sheriff Erik Apperson, Sergeant Grant Henderson, Sheriff Deputy Neal Oilar, Sheriff Deputy Robert Clarkson and Sheriff Deputy Adam Daniels (Del Norte County Defendants), as well as others. Brown sought over $10,000,000 in damages for violation of her civil rights in connection with her 2014 arrest by National Park Ranger Joel Leachman at the Hiouchi Visitor Center in Del Norte County. Law Firm was retained to defend the Del Norte County Defendants, and Law Firm partner Vrieze was the primary attorney handling the matter.

Vrieze noticed Brown's deposition for April 27, 2017. On or about April 5, 2017, Brown requested that the deposition notice be withdrawn because the district court had postponed the initial case management conference originally scheduled for March 21, 2017, and she did not think she needed to appear for a deposition until after the conference. Vrieze took the deposition off calendar on April 14, 2017.

The parties filed a Joint Case Management Statement on November 22, 2017. Brown stated that she "has not requested or provided discovery to defendants thus far due to premature and waiting for new order and after CMC hearing on [December 5, 2017]." Respondents wrote: "Defendants will schedule plaintiff's deposition in December 2017, after the Case Management Conference. Defendants do not currently anticipate any other formal discovery before filing dispositive motions, but may serve a document request to obtain any documents from Plaintiff that she does not include in her initial disclosures."

During the initial case management conference before Magistrate Judge Illman on December 5, 2017, respondents informed the court they intended to move for summary judgment and had noticed Brown's deposition to facilitate the motion. Vrieze averred in his declaration: "While I do not recall my precise comments at that Case Management Conference, I do recall discussing with Magistrate Judge Illman, *in open court,* the Del Norte County Defendants' desire to promptly file for summary judgment and the need to depose plaintiff before being in a position to file the motion. There was a civil discussion about the need to complete plaintiff's deposition, as it was necessary to prepare the Motion for Summary Judgment, and I recall plaintiff having some objection to the taking of her deposition to the extent it interfered with her birthday and/or vacation plans. Judge Illman considered plaintiff's personal needs and defendants' needs to timely complete the plaintiff's deposition. He then allowed defendants to schedule plaintiff's deposition and ordered that it would commence December 18, [2017] and had to be completed no later than noon December 19, [2017]. The Civil Minutes filed December 6, [2017], a true and correct copy of the one I received is attached hereto as 'Exhibit C,' memorialized the deposition timing and also scheduled the filing deadlines for the anticipated Motions for Summary Judgment. (*See*, Exhibit C.)"

Brown was deposed in the federal litigation on December 18, 2017, and respondents moved for summary judgment in February 2018. In August 2018, Magistrate Judge Illman granted the motion, and judgment was entered accordingly.

B. Brown's Opposition to the Anti-SLAPP Motion

Brown filed an opposition to respondents' anti-SLAPP motion, arguing that Vrieze's statements to Magistrate Judge Illman regarding her deposition

scheduling were fraudulent, and section 425.16 does not recognize fraud, intentional misrepresentation, slander, defamation or concealment as a protected activity. Although she did not file a supporting declaration, she attached to her opposition a document entitled "Plaintiff's View on Discovery," purportedly from the federal litigation, which asserted that she stated during an April 2017 conference call that she would "do" a deposition after the initial case management conference, but "not prior to" the conference, and if her request to postpone her deposition were opposed, she would be willing to meet and confer.

C. Trial Court's Ruling

Respondents filed a reply brief, and their motion to strike was heard on March 22, 2019. In a written order granting the motion on April 29, 2019, the court ruled that Brown's complaint arose from respondents' exercise of free speech or petition rights and Brown did not submit any admissible evidence to show a probability of prevailing. This appeal followed.

II. DISCUSSION

An anti-SLAPP motion involves a two-step analysis. In the first step, defendants must show that the challenged cause of action arose from activity protected under section 425.16. If the defendant makes this showing, the plaintiff must demonstrate in the second step a probability of prevailing on each challenged claim based on protected activity. (§ 425.16, subd. (b); *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, 396 (*Baral*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1181 (*Wallace*), overruled on other grounds in *Baral*, *supra*, at p. 391.) We review de novo. (*Wallace, supra*, at p. 1181.)

A. First Step: Protected Activity

Section 425.16, subdivision (e) sets forth the activity protected by the statute, including "(1) any written or oral statement or writing made before

a . . . judicial proceeding" and "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." A statement is "in connection with" litigation if it "relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266.)

To determine if the plaintiff's claims arose from protected activity, we identify the acts on which the plaintiff has predicated the defendant's liability, based on the pleadings and the evidence submitted in support of and in opposition to the anti-SLAPP motion. (*Wallace, supra*, 196 Cal.App.4th at pp. 1183, 1189–1190; *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 408 (*Contreras*).)

Here, Brown's causes of action against respondents were based exclusively on statements Vrieze allegedly made to the magistrate judge during a court proceeding, regarding her willingness to sit for a deposition in the litigation. As statements made in a judicial proceeding and in connection with issues under consideration by a judicial body, Vrieze's statements fall squarely within the scope of the anti-SLAPP statute. (§ 425.16, subd. (e); *Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479–480 ["all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute"].)

Brown's arguments to the contrary are unavailing. She contends her lawsuit is not subject to the anti-SLAPP statute because it is a defamation suit based on Vrieze's allegedly false statement to a third party, and "lying and defaming someone is not a constitutionally protected right." The question, however, is not whether a statement is constitutionally protected,

but whether it falls within the scope of section 425.16, subdivision (e). As explained *ante,* it does.

Brown also argues that Vrieze "lied to a judge thereby committing perjury, fraud, fraud upon the court, obstruction of justice, [and] defamation," and "[a] movant may not use the anti-SLAPP statute to protect petitioning or speech activity that is illegal as a matter of law," citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 318. However, activity is not illegal as a matter of law for these purposes unless the defendant has conceded the illegality or the evidence conclusively demonstrates it. (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 423–424; *Flatley, supra*, at p. 317; *Wallace, supra*, 196 Cal.App.4th at p. 1188.) Here, respondents do not concede they did anything illegal, and Brown has not conclusively demonstrated they did.

Brown further argues that the anti-SLAPP statute does not apply because her case does not involve "a public issue nor an issue of public interest" and she "is not a public figure." However, because the statement on which liability is based was made during a court proceeding, it falls within the scope of the anti-SLAPP statute whether or not it pertained to a public issue or concerned a public figure. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 [no need to demonstrate that the statement made in connection with an official proceeding concerned an issue of public significance].)

B. Step Two: Probability of Prevailing

Once the defendant shows that the plaintiff's claims arise from protected activity, the burden shifts to the plaintiff to establish a probability of success on the claims. (§ 425.16, subd. (b)(1).) To decide whether the plaintiff has met this burden, the court considers the pleadings and the affidavits evincing the facts on which liability or a defense is based.

(§ 425.16, subd. (b)(2); *Contreras, supra,* 5 Cal.App.5th at p. 405.)

Brown did not offer any evidence to support her claims in the trial court, other than a copy of her "Plaintiff's View on Discovery," which merely confirmed her unwillingness to sit for a deposition until after the case management conference. In this court, she does not set forth in her appellate briefs any substantial argument as to why there is a probability she will prevail on her claims, supported with adequate citations to the record and legal authority. (See Cal. Rules of Court, rule 8.204(a).) In particular, she offers no direct rebuttal to respondents' assertion that the litigation privilege of Civil Code section 47, subdivision (b) bars her claims against them as a matter of law. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 211–212, 215–216 [statements in connection with a judicial proceeding are absolutely privileged, and the privilege precludes all but malicious prosecution claims]; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360–361 [the litigation privilege is absolute and bars all civil claims except for malicious prosecution].) Brown has forfeited any argument in this regard, and in any event fails to establish error. (*Caldera v. Department of Corrections & Rehabilitation* (2018) 25 Cal.App.5th 31, 46.)[1]

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[1] Attached to Brown's opening brief in this appeal—but not to her opposition to the motion to strike—is a purported reporter's transcript of part of the case management conference. According to this transcript, Vrieze stated he "originally set her deposition for sometime in May" and "she objected and refused to set up until this CMC, which got bumped over a number of times." The transcript further indicates that Vrieze said he wanted to take Brown's deposition on the day before (or of) the case management conference, but Brown "refused to do that, so I had to set it for the 18th." Brown then said: "I've never refused to do the deposition. I was told by an attorney that the proper time for deposition is after the case management conference. So that's what I've told John Vrieze since the very beginning, that after this hearing I will be doing this deposition. And I did write it in my statement, in the case management statement." The court

C. Attorney Fees

A prevailing defendant on an anti-SLAPP motion is entitled to recover its attorney fees and costs. (§ 425.16, subd. (c).) Statutory authorization for an attorney fee award includes fees incurred on appeal, unless the statute expressly states otherwise. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) Respondents contend this court has the option of determining the amount of fees to be awarded for the appeal or, alternatively, remanding the issue to the trial court. (Citing *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 924.) We will remand the matter to the trial court for further consideration under section 425.16, subdivision (c).[2]

III. DISPOSITION

The judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion and applicable law, including Code of Civil Procedure section 425.16, subdivision (c).

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responded that the deposition would proceed on May 18. The transcript is consistent with Vrieze's assertion that Brown refused to sit for her deposition until the case management conference, which Brown herself has repeatedly confirmed. It does not establish that Vrieze falsely stated she refused to sit for her deposition entirely, and there is no indication the court formed any bad feelings toward Brown as a result of Vrieze's statement. And even if it did, or if we accepted Brown's allegations as true, she fails to demonstrate any probability of prevailing in light of the litigation privilege.

[2] At oral argument, Brown contended that the anti-SLAPP statute is unconstitutional. Her argument is not persuasive.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.